

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

P. (No. 4)

v.

EPO

120th Session

Judgment No. 3527

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr A.P. against the European Patent Organisation (EPO) on 1 July 2011, the EPO's reply of 2 November, the complainant's rejoinder of 3 December 2011 and the EPO's surrejoinder of 22 March 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

In his fourth complaint, the complainant challenges the EPO's refusal to award him moral damages on account of the length of the internal appeal proceedings.

By a Note of 6 October 2006 the European Patent Office, the EPO's secretariat, introduced the requirement for staff members to register online 24 hours prior to intended strike participation. There had been calls by the Staff Union of the European Patent Office (SUEPO) to participate in strikes on all EPO sites, including a strike at the complainant's place of employment scheduled for 17 October. The Note further provided that some staff members' presence could be required in order to maintain a minimum level of service, and that

chairmen of an examining division who were due to participate in oral proceedings on the intended strike day were requested to perform their duties until further notice.

By a Note of 11 October 2006 the EPO Administration informed all staff members that the obligation of advance registration established in the Note of 6 October had been cancelled.

On 13 October 2006 the complainant filed a request for review against the Note of 6 October, arguing that it was in breach of the right to strike and requesting its immediate withdrawal, as well as 1,000 euros in moral damages per day of strike and 1,000 euros in costs. His request for review was rejected in October 2008 and his appeal was referred to the Internal Appeals Committee (IAC) for an opinion.

The EPO submitted its position paper in March 2009 and a hearing was held on 19 October 2010. During the hearing the complainant modified his claims and additionally requested an award of 1,000 euros in moral damages for the length of the internal appeal proceedings and 500 euros in costs.

In its opinion of February 2011 the IAC unanimously recommended that the appeal be rejected as irreceivable on the grounds that the complainant's claim to quash the Note of 6 October 2006 was moot, as the subsequent Note of 11 October had cancelled the requirement that staff members register online prior to an intended strike participation. With respect to the requirement that chairmen due to participate in oral proceedings on the day of the strike perform their duties, the IAC also unanimously found that the complainant had no cause of action and that he had suffered no prejudice given that he was not affected by this measure and that oral proceedings were set in advance by the EPO. As he was not a staff representative, he could not claim to be representing collective interests either. On the merits, the IAC unanimously found that his appeal was unfounded, since both measures challenged by the complainant were found not to be in breach of the right to strike. It nevertheless recommended awarding him 300 euros in moral damages for the length of the internal appeal proceedings, which had lasted four years, observing that the complainant was partly

responsible for the delay, but that the delay in submitting the EPO's position paper was excessive.

By a letter of 8 April 2011 the Director of Regulations and Change Management informed the complainant that, by delegation of power from the President, he had decided to reject his appeal as irreceivable in accordance with the IAC's unanimous opinion and for the reasons set out by the EPO in the internal appeal proceedings. The letter stated that, in accordance with instructions from the President, an award of damages for the duration of the appeal was denied. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to provide "guidance" on the appropriate level of compensation for excessive delay in the internal appeal proceedings. He seeks moral damages, as well as costs, and asks for exemplary damages in the amount of no less than 10,000 euros in the event that the EPO does not produce the President's "instructions" referred to in the decision impugned. He asks for other and further relief as the Tribunal deems appropriate.

The EPO rejects the complainant's claims as partly irreceivable and totally unfounded and asks the Tribunal to order that the complainant bear his costs.

CONSIDERATIONS

1. By a letter dated 8 April 2011 the Director of Regulations and Change Management, by delegation of authority from the President, informed the complainant that he had decided to follow the IAC's unanimous opinion to reject his appeal as irreceivable. However, contrary to the recommendation of the IAC, it was decided not to award him 300 euros in moral damages for the delay in the internal appeal proceedings. The letter stated that, in accordance with instructions from the President and since the complainant's appeal had been without substance as from the date of its filing, compensation for the length of the internal appeal proceedings could not be deemed justified. The complainant impugns that decision insofar as it does not award him

damages for the delay in the internal appeal proceedings. His complaint is exclusively based on the excessive delay between the date when the internal appeal was filed (13 October 2006) and the date when the final decision was taken (8 April 2011), warranting an award of damages.

2. The complainant also impugns the decision on the ground that the Director of Regulations and Change Management lacked the authority to take the decision, as the Act of Delegation had not been made publicly available to staff members and, as a result, it never entered into force. He adds that, in cases in which the Administration does not entirely follow a unanimous opinion of the IAC, the Act of Delegation, as amended on 19 July 2010, expressly provides that the power of decision is delegated to the Vice-President in charge of Administration. The complainant also argues that the decision did not provide adequate reasoning.

3. It is useful to note that while the IAC was unanimous in recommending an award of damages for the delay in the internal appeal proceedings, it also unanimously recommended that the complainant's appeal be dismissed as irreceivable.

4. With regard to the additional grounds raised in his fourth complaint, the complainant submits that the decision was taken by the Director of Regulations and Change Management, who lacked the authority to do so, not only as the validity of the Act of Delegation itself was in doubt, but also because the proper authority to take the decision should have been the Vice-President in charge of Administration according to the express terms of the Act of Delegation as amended on 19 July 2010. As the IAC's unanimous recommendation to reject the appeal as irreceivable was adopted in the final decision, it was appropriate and in accordance with the Act of Delegation as amended on 19 July 2010 and the Act of Sub-delegation of 15 January 2010 for the Director of Regulations and Change Management to take the decision by delegation of power from the President and by sub-delegation of power from the Principal Director of Human Resources. It is not in doubt that the President of the EPO may delegate his authority to other

officials. However, and as pointed out in Judgment 2028, under 8(3), “when a complainant calls for proof that power has in fact been delegated to a specific person, it is a matter for the Organisation to produce such proof” (see also Judgments 3071, under 27, and 2558, under 4(a)). In the present case, the EPO did provide proof to the complainant of the delegation of power, his plea is therefore unfounded in this regard. The Tribunal holds that the decision impugned also constitutes the official communication of the President’s decision to reject the IAC’s recommendation insofar as it recommended an award of moral damages for the delay in the internal appeal proceedings. As the Director of Regulations and Change Management specifically stated that he was only communicating the President’s decision and given that the complainant does not provide any arguments that would put in question this statement, except for asking for a copy of the President’s “instructions”, his arguments in this regard are unsubstantiated. In accordance with the standard practice, often used in international organisations, the aforementioned letter specifies that “in accordance with instructions from the President of the Office”, which is a clear indication that with respect to the decision not to award moral damages the Director was not taking the decision himself, but was merely communicating the President’s decision to the complainant. The Tribunal has no reason to doubt that the President took that decision. This is consistent with the case law. (See Judgments 2833, under 3, 2915, under 14, and 3151, under 6.)

5. With regard to the complainant’s claim regarding the failure to provide adequate reasons for the decision, the Tribunal finds that the decision was properly reasoned. As explained in the letter of 8 April 2011, the decision to adopt the IAC’s recommendation to reject his appeal as irreceivable was taken in accordance with the reasoning set out in the EPO’s submissions during the internal appeal proceedings, as well as the reasoning of the IAC as detailed in its opinion. The complainant’s claim for moral damages failed on the finding that the complainant lacked any cause of action with regard to the decision challenged (the Note of 6 October 2006, which introduced the obligation of advanced registration for intended strike

participation), as that decision was withdrawn prior to the strike it was intended to address. Moreover, the complainant was not an on-duty chairman of an examining division on the day of the planned strike and, therefore, the EPO's measure also introduced in the Note to secure the presence of these chairmen on the prospective days of strike did not apply to him. Finally, as noted above, the decision not to award moral damages for the delay was taken, in accordance with instructions from the President, on the ground that, as the appeal had been "without substance already as from its filing, a compensation [could not] be deemed justified". As such, the complainant's pleas on the improper delegation of authority and the lack of justification for the decision are unfounded.

6. The Tribunal has consistently held that international organisations have a duty to ensure that internal appeals are conducted with due diligence and with due regard to the duty of care owed to staff members (see, in particular, Judgment 2522). While the time an appeal might reasonably take will usually depend on the specific circumstances of a given case, in this case the internal appeal was clearly irreceivable for lack of cause of action. As such, it could not be considered to be particularly complicated and certainly not enough to warrant internal appeal proceedings lasting more than four years. Such a delay is indeed egregious and the complainant is entitled to an award of moral damages. "The amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations. One is the length of the delay and the other is the effect of the delay. These considerations are interrelated as lengthy delay may have a greater effect. That latter consideration, the effect of the delay, will usually depend on, amongst other things, the subject matter of the appeal. Delay in an internal appeal concerning a matter of limited seriousness in its impact on the appellant would be likely to be less injurious to the appellant than delay in an appeal concerning an issue of fundamental importance and seriousness in its impact on the appellant. For example, an extensive delay in relation to an appeal concerning the dismissal of a staff member could have a profound impact on his or her circumstances. On the other hand, a delay of precisely the same

period in relation to an appeal concerning a comparatively trifling issue may have limited or possibly even no impact on the circumstances of the staff member.” (See Judgment 3160, under 17.)

7. The Tribunal considers that the appeal was clearly irreceivable: the decision contested in the complainant’s internal appeal was cancelled before the appeal was filed. Thus, the Tribunal is of the opinion that the complainant could have withdrawn his appeal when it became apparent that it would fail. The complainant has noted that he was aware of the heavy backlog facing the IAC and the consequent delays in the internal appeal proceedings. Under the circumstances, not withdrawing the appeal could perhaps give the impression that the appeal was maintained only because of the likelihood that the IAC would recommend the payment of damages for the delay. Whether the delay was due to the EPO’s tardiness or to the malfunctioning of the IAC is simply irrelevant in light of its duty to provide to the members of its staff an efficient internal means of redress (see Judgments 2392, under 6, 2196, under 9, and the case law cited therein). The Tribunal notes that the EPO has in the meantime taken measures to address the backlog of internal appeals.

8. In light of the above, the Tribunal finds that the EPO violated its duty of care by failing to ensure efficient internal appeal proceedings within a reasonable time. Thus, considering the excessive length of the proceedings and the lack of negative impact on the complainant, the Tribunal sets the amount of moral damages at 250 euros. As the complaint succeeds in part, the complainant is entitled to an award of costs which the Tribunal sets at 200 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant moral damages in the amount of 250 euros.

2. It shall pay him costs in the amount of 200 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 19 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

CLAUDE ROUILLER

DOLORES M. HANSEN

DRAŽEN PETROVIĆ